STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 8, 2010
v CHARLES RAY SMITH, Defendant-Appellant.	No. 288595 Oakland Circuit Court LC No. 2008-219454-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JONATHAN ALONZO PHLEGM, Defendant-Appellant.	No. 288622 Oakland Circuit Court LC No. 2007-217026-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v STEVEN ANTHONY BARD, Defendant-Appellant.	No. 288626 Oakland Circuit Court LC No. 2007-217024-FC

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendants Charles Smith, Jonathan Phlegm, and Steven Bard were each convicted of two counts of first-degree murder (each count supported by alternative theories of premeditated murder and felony murder), MCL 750.316(1)(a) and (b);

two counts of assault with intent to rob while armed, MCL 750.89; first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c); conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529; first-degree home invasion, MCL 750.110a(2); and two counts of unlawful imprisonment, MCL 750.349b. In addition, defendants Phlegm and Bard were both convicted of eleven counts of possession of a firearm during the commission of a felony, MCL 750.227b.[1]

Defendant Smith was sentenced as a second habitual offender, MCL 769.10, to life imprisonment for each murder conviction, and concurrent prison terms of 29-1/2 to 100 years, each, for the assault, CSC, and conspiracy convictions, and 9-1/3 to 22-1/2 years for each unlawful imprisonment conviction, to be served consecutive to a term of 13-1/2 to 30 years' imprisonment for the home invasion conviction. Defendant Phlegm was sentenced as a second habitual offender to life imprisonment for each murder conviction, and concurrent prison terms of 34-2/3 to 90 years, each, for the assault, CSC, and conspiracy convictions, 20 to 30 years for the home invasion conviction, and 60 to 90 months for each unlawful imprisonment conviction, to be served consecutive to 11 concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendant Bard was sentenced as a third habitual offender, MCL 769.11, to life imprisonment for each murder conviction, and concurrent prison terms of 35 to 75 years, each, for the assault, CSC, and conspiracy convictions, and 20 to 30 years for each unlawful imprisonment conviction, to be served consecutive to a term of 25 to 40 years' imprisonment for the home invasion conviction, and also consecutive to nine concurrent two-year terms of imprisonment for the felony-firearm convictions. Each defendant appeals as of right. Their appeals have been consolidated for this Court's consideration. We remand for correction of defendant Phlegm's judgment of sentence, to specify that he stands convicted of only two counts of felony-firearm in relation to the first-degree murder convictions, and thus stands convicted of only nine counts, not 11 counts, of felony-firearm, and affirm in all other respects.

I. FACTUAL BACKGROUND

According to the evidence at trial, during the early morning hours of June 5, 2007, all three defendants broke into a house in Pontiac where Cleveland Brown, a member of a gang known as the "A-Team," and Maurice Threlkeld, a known drug dealer, both lived. Only Brown and his girlfriend were present at the time of the break-in, but Threlkeld returned home while defendants were inside the house. Defendant Smith sexually assaulted Brown's girlfriend. The house was ransacked, and Threlkeld and Brown were forcibly removed from the house. On June 6, the bodies of Threlkeld and Brown were found in Brown's Chevrolet Suburban vehicle, which was parked on the I-75 service drive. Threlkeld and Brown both died from gunshot wounds.

The sexual assault victim identified defendant Bard in a photographic lineup and identified defendant Phlegm in a corporeal lineup as individuals who participated in the crimes. Although she was unable to identify the person who sexually assaulted her, defendant Smith's DNA matched DNA obtained from the victim during a sexual assault examination and from a condom found in the bedroom where the assault took place. Other individuals, including Johnny

[1] The trial court later vacated two of defendant Bard's felony-firearm convictions.

Hodges, a member of the same gang as defendants Bard and Phlegm, were excluded as a possible source of the DNA evidence.

At trial, Hodges testified that he provided false information to law enforcement officers when he was initially questioned during the police investigation, but later decided to come forward and testify for the prosecution because of his friendship with Threlkeld. He claimed that he was affiliated with defendants Bard and Phlegm through their membership in a Pontiac gang known as the North World Org or North World Order ("NWO"), and that other gang members, including defendant Bard, introduced him to defendant Smith. Hodges testified that he had contact with each defendant on June 5, 2007. He testified regarding statements made to him by defendant Bard regarding the killing of Threlkeld and Brown, and how Brown was targeted because he owed money for drugs.[2] He also testified regarding a NWO gang meeting that all three defendants attended later in the day on June 5, at which attendees were directed to search for members of the "A-Team" gang, who were reportedly responsible for abducting defendant Bard's brother. Hodges testified that his involvement in the events surrounding Brown and Threlkeld was limited to getting rid of the guns used in the crimes.

II. ACCOMPLICE INSTRUCTION

Each defendant argues that his defense attorney was ineffective for failing to request an "accomplice testimony" jury instruction, see CJI2d 5.6, with respect to Hodges's testimony. Although defendant Smith alternatively argues that the trial court's failure to give the accomplice testimony instruction was plain error that affected his substantial rights, his attorney's affirmative approval of the trial court's jury instructions effected a waiver of this issue, thereby extinguishing any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Therefore, we must analyze this issue solely within the context of defendants' ineffective assistance of counsel claims.

None of the defendants properly raised this issue in a motion for a new trial or a *Ginther*[3] hearing. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Although defendants Smith and Bard each raised this issue in a motion to remand in this Court, both motions were denied. *People v Smith*, unpublished order of the Court of Appeals, entered July 27, 2009 (Docket No. 288595); *People v Bard*, unpublished order of the Court of Appeals, entered July 31, 2009 (Docket No. 288626). We find no reason to revisit those decisions. Because no *Ginther* hearing was held, our review is limited to errors apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *Jordan*, 275 Mich App at 667. To establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. *People v Carbin*, 463

[2] This testimony was presented only to defendant Bard's jury.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Mich 590, 599-600; 623 NW2d 884 (2001). As explained in *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007):

> The right to counsel is guaranteed by the United States Constitution and the Michigan Constitution. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. We will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. [Citations omitted.]

Where appropriate, an accomplice testimony instruction informs the jury that testimony provided by an accomplice should be viewed with suspicion. *People v Reed*, 453 Mich 685, 693-694; 556 NW2d 858 (1996). The instruction is not appropriate, however, if there is no evidence to support it. *People v McGhee*, 268 Mich App 600, 608; 709 NW2d 595 (2005); see also *People v Gonzalez*, 468 Mich 636, 643-644; 664 NW2d 159 (2003).

An accomplice is a "person who knowingly and willingly helps or cooperates with someone else in committing a crime." *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJ2d 5.5. Each defendant argues that an accomplice testimony instruction would have been appropriate because Hodges was an accessory *after* the fact. However, whereas an accessory *before* the fact may be held criminally liable as an aider and abettor to a crime, *People v Robinson*, 475 Mich 1, 7-9; 715 NW2d 44 (2006), a person who is merely an accessory after the fact does not participate in the principal offense. Rather, "[t]he crime of accessory after the fact is akin to obstruction of justice." *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999). Because there was no evidence that Hodges participated in the charged offenses, an accomplice instruction would not have been appropriate. "Trial counsel is not required to advocate a meritless position," *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), or make a futile objection, *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008). Thus, none of the defense attorneys were ineffective for failing to request an accomplice testimony instruction with respect to Hodges's testimony.

III. DETECTIVE MACQUARRIE'S TESTIMONY

Defendants Smith and Bard each raise claims involving the adequacy of their respective counsel's responses to Detective Douglas MacQuarrie's testimony, on cross-examination by counsel for defendant Bard, that Hodges passed "certain tests" that cleared him from prosecution. Defendant Smith argues that his attorney was ineffective for not moving for a mistrial, while defendant Bard argues that his attorney should have moved for a mistrial or requested an opportunity to ask follow-up questions, and not simply joined in codefendant Phlegm's request to ask a follow-up question. Alternatively, defendant Bard argues that the testimony, without any opportunity for follow-up questions, requires reversal regardless of whether his attorney performed deficiently, because the testimony improperly referred to

evidence of a polygraph examination and amounted to improper vouching for Hodges's credibility.

Addressing first defendant Bard's substantive claim, we conclude that this issue is unpreserved and, accordingly, subject to review for plain error affecting his substantial rights. MRE 103(a); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999). The only adverse ruling received by defendant Bard was an evidentiary one, namely, whether counsel for codefendant Phlegm should have been allowed to ask Detective MacQuarrie whether "Hodges did not pass certain tests." The record does not indicate how Detective MacQuarrie would have responded to that question because counsel did not request an opportunity to make a record of the proposed testimony outside the presence of the jury, as permitted by MRE 104(c). Absent an offer of proof regarding how Detective MacQuarrie would have answered the question, defendant Bard cannot show that the excluded testimony affected his substantial rights.

In any event, the record is clear that defendant Bard was given an opportunity to have the challenged testimony stricken by the trial court, with an appropriate cautionary instruction, but declined this remedy. Therefore, defendant Bard did not receive any adverse ruling with respect to the "certain tests" testimony itself. Stated otherwise, the trial court agreed that the testimony should not have been presented to the jury. Because counsel for defendant Bard, armed with knowledge that the trial court would not permit additional questions regarding the matter, but was unwilling to have the testimony stricken and did not move for a mistrial, we shall treat defendant Bard's present claim as an unpreserved claim that the trial court should have declared a mistrial. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

An unpreserved claim that a mistrial should have been declared is reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Nash*, 244 Mich App at 97. "A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *Horn*, 279 Mich App at 36. Here, there is nothing in the record to indicate that any prejudicial effect caused by Detective MacQuarrie's brief testimony could not have been cured by striking the testimony and giving an appropriate cautionary instruction. Such instructions are presumed to cure most errors. *Id.*

Even if we were to consider the factors relevant to a witness's improper reference to a polygraph examination, reversal would not be required. *McGhee*, 268 Mich App at 630-631; *Nash*, 244 Mich App at 98. Evidence regarding polygraph examinations is generally inadmissible at trial because polygraph examinations have not been generally accepted as reliable in the scientific community. *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985). Although a police witness has a special duty not to venture into forbidden areas that might prejudice the defense, *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983), Detective MacQuarrie did not mention the word polygraph when explaining that Hodges had passed "certain tests." The testimony itself was responsive to the question asked by defendant Bard's counsel regarding why Detective MacQuarrie did not interview Hodges between June 2007 and June 2008. Further, the response was brief, ambiguous, and not repeated. Moreover, it was apparent from the testimony that Hodges had been investigated, but not prosecuted for the crimes, and it was made known to the jury that he was subjected to at least DNA testing, but was excluded as a source of the DNA linked to the sexual assault. Considering the record in its entirety, we are persuaded that Detective MacQuarrie's testimony did not require

a mistrial, and it is clear that any request for a mistrial would have been denied. Therefore, we reject this claim of error.

Defendant Bard preserved his alternative claim that counsel was ineffective, because he moved for a new trial on this ground in the trial court. *Wilson*, 242 Mich App at 352. But because no *Ginther* hearing was conducted, our review is limited to errors apparent from the record. *Horn*, 279 Mich App at 38; *Wilson*, 242 Mich App at 352. We find no support for defendant Bard's claim that his attorney was ineffective for not proposing his own follow-up questions. Decisions regarding the questioning of witnesses are presumed to be matters of trial strategy. *Horn*, 279 Mich App at 39. In any event, it is apparent from the record that the trial court would not have permitted any additional questioning on this subject matter, or granted any motion for a mistrial. After considering various options, the court determined that the appropriate remedy was to strike the inappropriate response and give a cautionary instruction. Because it was not necessary that defense counsel advocate a futile position, defendant Bard's claim of ineffective assistance of counsel on this ground cannot succeed. *Snider*, 239 Mich App at 425.

Turning to defendant Smith's unpreserved ineffective assistance of counsel claim based on his attorney's failure to move for a mistrial, we have limited our review to errors apparent from the record. *Jordan*, 275 Mich App at 667. Because defendant Smith expressly acquiesced on the record to his attorney's decision not to request any remedy, let alone a mistrial, this issue could be considered waived. To hold otherwise would allow defendant Smith to harbor error as an appellate parachute. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). In any event, counsel's considered decision not to raise objections to Detective MacQuarrie's testimony, or request any remedy, was a matter of trial strategy. *Unger*, 278 Mich App at 242. Further, the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant Smith's acquiescence in his attorney's decision not to seek any remedy for Detective MacQuarrie's brief testimony is evidence that counsel's decision was reasonable. Further, because it is apparent from the record that any motion for a mistrial would have been denied, defendant Smith's claim of ineffective assistance of counsel on this ground cannot succeed. *Odom*, 276 Mich App at 415; *Snider*, 239 Mich App at 425.

IV. EYEWITNESS IDENTIFICATION

Defendants Phlegm and Bard each argue that the trial court should have appointed an expert witness on identification testimony to assist the jury in evaluating the reliability of their identifications by the sexual assault victim. Defendant Phlegm claims that the trial court erred in denying his pretrial motion for the appointment of an expert, while defendant Bard argues that his attorney was ineffective for not joining in the motion. Defendant Bard further argues that his attorney was ineffective for not moving to suppress the victim's identification of him in a photographic lineup and at trial.

A trial court's decision denying the appointment of an expert witness is reviewed for an abuse of discretion. MCL 775.15; *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399

(2006). An abuse of discretion occurs when the court's decision falls outside the range of principled outcomes. *Id.* at 616-617. As explained in *Carnicom,* 272 Mich App at 617:

> MCL 775.15 authorizes payment for an expert witness, provided that an indigent defendant is able to show "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial . . . ." If the defendant makes this showing, the judge, "in his discretion," may grant funds for the retention of an expert witness. *Id.* A trial court is not compelled to provide funds for the appointment of an expert on demand. *Id.*; *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003).
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> To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). It is not enough for the defendant to show a mere possibility of assistance from the requested expert. *Tanner, supra* at 443. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Jacobsen, supra* at 641.

In this case, the trial court did not abuse its discretion in finding that defendant Phlegm failed to demonstrate the need for an expert witness in the area of identification testimony. We recognize that eyewitness identification is subject to potential flaws, and that circumstances may call into question the reliability of an eyewitness identification, separate from any attack on the witness's credibility. *People v Davis,* 241 Mich App 697, 701-702; 617 NW2d 381 (2000). Further, an unduly suggestive identification procedure may require suppression of an in-court identification by a witness if there is not an independent basis for the identification. *Id.* at 700-702.

It is also obvious that memories and perceptions of an eyewitness are sometimes inaccurate. *People v Cooper,* 236 Mich App 643, 658; 601 NW2d 409 (1999). Thus, in *United States v Langan,* 263 F3d 613, 624 (CA 6, 2001), the court observed that while "expert testimony on eyewitness identification might inform the jury on all of the intricacies of perception, retention, and recall, . . . the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors." Historically, whether a witness suffers from physical or mental disorders or delusions has been a factor in determining whether a court should allow an expert witness on identification. *People v Hill,* 84 Mich App 90, 96; 269 NW2d 492 (1978). Whether the defendant has other means of calling a witness's identification into question is also relevant in determining if a trial court abuses its discretion by refusing to appoint an expert witness. See *People v Carson,* 217 Mich App 801, 807; 553 NW2d 1 (1996), readopted in pertinent part by a special panel in *People v Carson,* 220 Mich App 662, 678; 560 NW2d 657 (1996).

In this case, the basis for defendant Phlegm's motion for appointment of an identification expert did not involve the broad concerns regarding eyewitness identifications that defendant Phlegm advocates on appeal, but rather that information in a police report indicated that the sexual assault victim saw him on the day before she identified him in the corporeal lineup. At an evidentiary hearing, however, the victim denied seeing defendant Phlegm before the lineup. The trial court reasonably concluded that defendant Phlegm was substantively attacking the victim's credibility. Under the circumstances, the court did not abuse its discretion in denying the

motion. An expert witness could not have assisted defendant Phlegm in establishing whether the victim saw him before she attended the lineup. Further, counsel for defendant Phlegm had other means, including cross-examination, for questioning the accuracy and reliability of the victim's identification at trial. Defendant Phlegm failed to show that he could not safely proceed to trial without the appointment of an expert witness on identification. *Carnicom,* 272 Mich App at 617.

Defendant Bard preserved his claim that counsel was ineffective for not joining in codefendant Phlegm's motion for the appointment of an identification expert by moving for a new trial on this ground. *Wilson,* 242 Mich App at 352. But because no *Ginther* hearing was conducted, our review is limited to errors apparent from the record. *Horn,* 279 Mich App at 38; *Wilson,* 242 Mich App at 352.

Having concluded that the trial court did not abuse its discretion in denying defendant Phlegm's motion, defendant Bard's claim that counsel was ineffective for not joining in the motion must also fail. *Snider,* 239 Mich App at 425. Furthermore, a decision whether to present expert testimony is presumed to be a permissible exercise of trial strategy. *Cooper,* 236 Mich App at 658. "There is . . . a strong presumption of effective counsel when it comes to issues of trial strategy." *Odom,* 276 Mich App at 415. Defendant Bard has failed to overcome the presumption that his attorney engaged in sound trial strategy. *Horn,* 279 Mich App at 39.

To the extent that defendant Bard suggests that the victim's identification of him in the photographic lineup was affected by the same type of pre-lineup "taint" that was the basis for defendant Phlegm's motion for the appointment of an identification expert, we note that defendant Bard has not cited any factual support for his position that the sexual assault victim saw his photograph before the photographic lineup. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman,* 184 Mich App 255, 260; 457 NW2d 136 (1990). In any event, the victim testified at trial that she did not watch any television newscasts before she participated in the photographic lineup and, therefore, she would not have seen any photograph of him that may have been published in a newscast before the lineup was conducted. This testimony is fatal to defendant Bard's claim of a "tainted" photographic lineup, as well as his claim that counsel was ineffective by not moving to suppress the victim's identification based on the alleged taint. A defendant claiming ineffective assistance of counsel bears the burden of establishing the factual predicate for his claim. *Carbin,* 463 Mich at 600.

V. DEFENDANT SMITH'S STANDARD 4 BRIEF

Defendant Smith raises two additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, neither of which have merit.

He first argues that he is entitled to a new trial because the prosecutor knowingly presented Hodges's perjured testimony at trial. Because defendant Smith failed to join in codefendant Bard's pretrial motion to exclude Hodges's testimony at trial, and he did not otherwise raise this issue below, it is unpreserved. *People v Poindexter,* 138 Mich App 322, 331; 361 NW2d 346 (1984). We decline to consider the police reports and other documents submitted with defendant Smith's brief on appeal because they are not part of the record on appeal. It is impermissible to expand the record on appeal. *People v Powell,* 235 Mich App 557, 561 n 4;

599 NW2d 499 (1999); see also *Horn*, 279 Mich App at 38. Further, this Court previously denied defendant Smith's pro se motion to remand to allow the documents to be made part of the record, see *People v Smith*, unpublished order of the Court of Appeals, entered December 14, 2009 (Docket No. 288595), and we find no basis for revisiting that decision.

We review unpreserved claims of prosecutorial misconduct for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763; *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). A defendant has a due process right to a criminal prosecution that comports with prevailing norms of fundamental fairness; therefore, a prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). But knowledge of false testimony is not imputed to a prosecutor simply because it conflicts with another statement. *Id.* at 278-279. Even a prosecutor's presentation of witnesses with contradictory testimony does not constitute the presentation of perjured testimony where there is no evidence that the prosecutor knows which testimony is true or false. *United States v Sherlock*, 962 F2d 1349, 1364 (CA 9, 1992). To require reversal of a conviction obtained through the knowing use of perjured testimony, there must be a reasonable likelihood that the false testimony affected the jury's judgment. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009).

Although defendant Smith's counsel did not join in codefendant Bard's pretrial motion to preclude Hodges from testifying at trial, the record made at that time is instructive. The trial court determined that the results of any polygraph examinations taken by Hodges would be inadmissible at trial because such examinations lack scientific reliability, and that the unreliability of such evidence defeated codefendant Bard's argument that Hodges's testimony should be precluded at trial. Defendant Smith has not established any error in the trial court's determination. At most, defendant Smith has shown that Hodges made prior inconsistent statements, which properly could be used for impeachment. MRE 613; *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). Defendant Smith has also shown that Hodges's credibility was disputed at trial. But absent exceptional circumstances, the credibility of testimony is for the jury to decide. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Because there has been no clear showing that Hodges's trial testimony was false, let alone that the prosecutor knew that the testimony was false, defendant Smith has not established the necessary plain error to warrant appellate relief. *Brown*, 279 Mich App at 134.

We also reject defendant Smith's second unpreserved claim that the prosecutor knowingly presented perjured DNA testimony. The challenged testimony regarding testing performed on the condom was not material because the prosecutor's DNA expert, Helton, testified that the vaginal swab obtained from the sexual assault victim contained defendant Smith's DNA. Indeed, defendant Smith did not dispute that he was the source of the DNA, but rather presented a defense theory that he engaged in consensual sex with the victim.

Furthermore, contrary to defendant Smith's argument on appeal, Helton's conclusion that defendant Smith's DNA was on both swabs taken from the condom was not inconsistent with Melinda Jackson's testimony. Although Jackson, the prosecutor's biology expert, was the person who prepared samples from the condom for Helton's DNA analysis, her testimony indicated that she conducted only a limited analysis of the condom. Jackson testified that she only performed a chemical test to detect seminal fluid, and did not use a microscope to determine if actual sperm cells were present on the swab that she labeled as having been obtained from the

exterior part of the condom. Thus, it was not inconsistent for Helton to find DNA evidence linked to defendant Smith on that sample. Accordingly, defendant Smith has failed to establish any misconduct by the prosecutor in presenting this evidence.

VI. DEFENDANT PHLEGM'S OTHER ISSUES

Defendant Phlegm argues that the evidence was insufficient to support his conspiracy conviction and, likewise, the associated felony-firearm conviction. We disagree. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

The essence of a criminal conspiracy is an unlawful agreement. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The crime requires both an intent to combine with others and an intent to accomplish the illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). "What the conspirators actually did in furtherance of the conspiracy is evidence of what they agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). "[P]roof may be derived from the circumstances, acts, and conduct of the parties" *Justice*, 454 Mich at 347.

Defendant Phlegm was convicted of conspiring to commit armed robbery. A conviction of armed robbery, MCL 750.529, requires proof that

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

Although there was no direct evidence of an agreement to commit a robbery, there was circumstantial evidence that defendant Phlegm and at least two other men, codefendants Bard and Smith, agreed to use force or violence against at least Brown to commit a larceny. The testimony of the sexual assault victim supported an inference that the defendants were parked in a vehicle outside Brown's house, lying in wait for him to return. Shortly after Brown returned, the defendants forcibly entered his house and made a demand for "work," which the sexual assault victim understood to be a reference to crack cocaine. After the entry, the house was ransacked, consistent with the goal of committing a robbery. The evidence that defendant Bard openly displayed a gun in the house, without objection by defendant Phlegm, also supports a reasonable inference that the conspiracy encompassed an armed robbery. "A person may be party to a continuing conspiracy by knowingly co-operating to further the objective thereof." *Hunter*, 466 Mich at 7. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant Phlegm's conspiracy conviction and the associated felony-firearm conviction.

Defendant Phlegm also argues that the prosecutor improperly remarked during rebuttal argument that he displayed "a consciousness of guilt" in the courtroom when he sat behind two banker boxes during the testimony of the sexual assault victim. Because defendant Phlegm did not object to the challenged remark, we review this issue for plain error affecting his substantial rights. *Carines,* 460 Mich at 763; *Brown,* 279 Mich App at 134.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* In general, a prosecutor's comments are examined as a whole and evaluated in light of defense arguments and the relationship they bear to the trial evidence. *Id.* at 135. "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington,* 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The record does not support defendant Phlegm's argument that the prosecutor's remark was speculative. The victim's answers to the prosecutor's questions confirmed that defendant Phlegm sat behind boxes during at least part of the victim's testimony. Further, there has been no clear showing that the prosecutor drew unreasonable inferences from defendant Phlegm's demeanor or conduct in the courtroom. Had defendant Phlegm timely objected, a record pertinent to this issue could have been made. Based on the existing record, however, it cannot be said that it was speculative for the prosecutor to argue that defendant Phlegm tried to hide or that his conduct showed a consciousness of guilt. Guilt leaves a variety of psychological marks on people, which are termed "consciousness of guilt." *People v Cutchall,* 200 Mich App 396, 401; 504 NW2d 666 1993).

We also disagree with defendant Phlegm's argument that the prosecutor's remarks implicate the principle that a prosecutor may not vouch for a witness's credibility. The prosecutor's rebuttal remarks were clearly directed at what the jury would see itself by looking at defendant Phlegm in the courtroom. The prosecutor did not imply any special knowledge concerning the victim's credibility by inferring that defendant Phlegm "showed a consciousness of guilt." See generally *People v Bahoda,* 448 Mich 261, 276; 531 NW2d 659 (1995); cf. *Commonwealth v Smith,* 387 Mass 900, 907; 444 NE2d 374 (1983) (comment on a defendant's in-court demeanor does not suggest knowledge that a jury does not share).

Although the record does not support defendant Phlegm's claim that the prosecutor made a speculative argument, or improperly vouched for the credibility of testimony, the question whether it is proper for a prosecutor to comment on a nontestifying defendant's in-court demeanor or conduct is not as clear, especially considering that the sexual assault victim made an in-court identification of defendant Phlegm. The nature of the victim's in-court confrontation with defendant Phlegm was material because the jury was responsible for determining the credibility of the identification testimony. *Davis,* 241 Mich App at 700.

We note that courts in other jurisdictions have reached different conclusions regarding the propriety of prosecutorial comment on a nontestifying defendant's in-court demeanor. Some courts hold that such comments are improper. See *United States v Mendoza,* 522 F3d 482, 491 (CA 5, 2008), and *State v John B,* 102 Conn App 453, 465-468; 925 A2d 1235 (2007). Other courts have found that comments regarding a defendant's courtroom appearance are proper. See

Smith v State, 284 Ga 599, 603-604; 669 SE2d 98 (2008), and *State v Brown*, 38 Ohio St 3d 305, 317; 528 NE2d 523 (1988) ("defendant's face and body are physical evidence. The prosecution may, of course, comment on the accused's appearance"). In some cases, the nature of the defendant's defense or conduct is relevant in determining the propriety of the prosecutor's remarks. See *Wherry v State*, 402 So 2d 1130, 1133 (Ala Crim App, 1981) (prosecutor's comments regarding a defendant's demeanor were proper where the nontestifying defendant claimed an insanity defense), and *State v Adames*, 409 NJ Super 40, 57-60; 975 A2d 1023 (2009) (comments regarding a defendant's demeanor is not proper, subject to a narrow exception for a defendant who clearly injects demeanor evidence as an unsworn attempt to influence the jury).

In this case, it is unnecessary to determine if the prosecutor exceeded the bounds of permissible argument by referring to defendant's in-court demeanor or conduct to infer a consciousness of guilt. Even if improper, defendant Phlegm's substantial rights were not affected by the prosecutor's remark. The critical issue at trial was the credibility of the victim's identification, not whether defendant Phlegm demonstrated a consciousness of guilt during the victim's testimony. The prosecutor introduced evidence that the victim consistently identified defendant Phlegm at a corporeal lineup and in court proceedings. Other evidence, including testimony by Hodges that placed defendant Phlegm in possession of the same type of gun used in the shooting, also linked defendant Phlegm to the crimes. In addition, the trial court instructed the jury that the "lawyers' statements are not evidence," that it should decide the case based on the evidence, and "[e]vidence includes only the sworn testimony of witnesses, the Exhibits admitted into evidence and anything else I told you to consider as evidence." Jurors are generally presumed to follow their instructions. *Unger*, 278 Mich App at 235. Therefore, this unpreserved issue does not warrant appellate relief.

Finally, we reject defendant Phlegm's claim that the cumulative effect of the prosecutor's "consciousness of guilt" remark, his attorney's failure to request an accomplice instruction, and the trial court's refusal to appoint an expert witness on eyewitness identification requires reversal. Only actual errors are aggregated to determine their cumulative effect. *Bahoda*, 448 Mich at 292 n 64. Having found no error with respect to the absence of an accomplice testimony instruction or the denial of defendant Phlegm's request for an expert witness, and having concluded that any error arising from the prosecutor's "consciousness of guilt" remark did not affect defendant Phlegm's substantial rights, defendant Phlegm is not entitled to relief under a cumulative error theory. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

Although defendant Phlegm does not raise the issue, we take this opportunity to correct an obvious error related to defendant Phlegm's felony-firearm convictions. Defendant Phlegm was convicted of 11 counts of felony-firearm. Four of those convictions were based on his convictions of four counts of first-degree murder related to the deaths of two individuals. The trial court properly amended defendant Phlegm's judgment of sentence to indicate that he was convicted of only two counts of first-degree murder, and to specify that each count was supported by alternative theories of premeditated murder and felony murder, MCL 750.316(1)(a) and (b). *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). Although the trial court also amended codefendant Bard's judgment of sentence to specify that he was convicted of only two counts of felony-firearm in relation to the first-degree murder convictions, it neglected to similarly amend defendant Phlegm's judgment of sentence. Accordingly, we remand for correction of defendant Phlegm's judgment of sentence to specify that he stands convicted of

only two counts of felony-firearm in relation to the first-degree murder convictions, and thus stands convicted of only nine counts, not 11 counts, of felony-firearm.

VII. DEFENDANT BARD'S OTHER ISSUES

Defendant Bard argues that the trial court abused its discretion in denying his motion for a new trial based on the great weight of the evidence. We disagree.

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Unger,* 278 Mich App at 232. Here, Defendant Bard's claim of error rests exclusively on the credibility of witnesses. Issues of witness credibility, however, are generally insufficient to warrant a new trial. *Id.* Because no extraordinary circumstances exist to warrant removal of credibility issues from the jury, the trial court did not abuse its discretion in denying defendant Bard's motion for a new trial on this ground. *Lemmon,* 456 Mich at 642-644, 648 n 27.

Defendant Bard also argues that a new trial is warranted based on newly discovered evidence. We disagree. A claim that newly discovered evidence warrants a new trial should be decided by the trial court in the first instance. *People v Givhan,* 472 Mich 907; 696 NW2d 710 (2005). As defendant Bard concedes, he failed to present an affidavit in support of his motion for a new trial on this ground in the trial court. Further, this Court previously denied defendant Bard's motion to remand to allow the trial court to further consider this matter. *People v Bard,* unpublished order of the Court of Appeals, entered July 31, 2009 (Docket No. 288626). We decline to revisit that decision. As indicated previously, it is generally impermissible to expand the record on appeal. *Powell,* 235 Mich App at 561 n 4; see also *Horn,* 279 Mich App at 38.

We note, however, that the affidavit submitted with defendant Bard's brief on appeal is not dated or notarized. A valid affidavit requires that it be confirmed by oath or affirmation before a person having authority to administer such oath or affirmation. *Detroit Leasing Co v Detroit,* 269 Mich App 233, 236; 713 NW2d 269 (2005). Therefore, the affidavit is not valid. Furthermore, the named affiant, Ashley Daniel, was named in defendant Bard's pretrial notice of alibi defense. For a new trial to be granted on the basis of newly discovered evidence, the evidence itself must be newly discovered. *People v Cress,* 468 Mich 678, 692; 664 NW2d 174 (2003). A known alibi witness does not meet the test for newly discovered evidence. See *People v Thomas,* 33 Mich App 664, 670-671; 190 NW2d 250 (1971). Because defendant Bard failed to make an offer of proof in the trial court of any witness who was truly newly discovered, the trial court did not abuse its discretion in denying his motion for new trial on this ground.

We also reject defendant Bard's claim that defense counsel was ineffective for failing to present an alibi defense at trial. Defendant Bard has the burden of establishing the factual predicate of his claim. *Carbin,* 463 Mich at 600. The reasonableness of counsel's actions may be determined or substantially influenced by defendant's own actions. *Strickland,* 466 US at 691. Because defendant Bard acquiesced on the record to defense counsel's decision to withdraw the alibi defense, this issue could be considered waived. *Barclay,* 208 Mich App at 673. In any event, there is nothing in the record to rebut defense counsel's representation at trial that he took steps to have the named alibi witnesses, Ashley Daniel and Karen Bard, made available to testify before the alibi defense was withdrawn. Limiting our review to the record,

defendant Bard has failed overcome the presumption that counsel's decision to withdraw the alibi defense, with defendant Bard's acquiescence, was sound trial strategy. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Therefore, his claim of ineffective assistance of counsel cannot succeed.

Citing MRE 613, defendant Bard also argues that defense counsel was ineffective by failing to impeach Hodges with a prior statement. Although the record indicates that counsel was unsuccessful in introducing extrinsic evidence of a written statement provided by Hodges while he was in prison, counsel elicited Hodges's testimony that the written statement was "very short" and did not include a "whole lot of things" mentioned in his testimony. Therefore, contrary to defendant Bard's argument on appeal, there was not an utter failure to use the statement for an impeachment purpose. Further, defendant Bard has not shown how further use of the statement could have aided his defense, especially considering the other evidence presented at trial, such as Hodges's use of aliases and position as a "thief" in the NWO gang, to attack his credibility. Therefore, defendant Bard has failed to establish either the deficient performance or the prejudice necessary to succeed on a claim of ineffective assistance of counsel. *Odom*, 276 Mich App at 415. Further, there has been no showing of actual errors committed by counsel that, in the aggregate, deprived defendant Bard of a fair trial. *Bahoda*, 448 Mich at 292 n 64; *Dobek*, 274 Mich App at 106.

Finally, defendant Bard argues that he is entitled to a new trial because of the prosecutor's misconduct. He first argues that the prosecutor improperly remarked in opening statement that he and codefendant Phlegm had a longtime association and, "as no surprise, they were committing these types of crimes together," without offering evidence of other crimes or notice that such evidence would be presented under MRE 404(b). Because there was no objection to this remark, our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763; *Brown*, 279 Mich App at 134.

The purpose of an opening statement is to "make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove." MCR 6.414(C). Examined in context, the challenged remarks do not suggest that the prosecutor was proposing to offer evidence of other crimes, but rather to show a longtime association between the two defendants. The prosecutor suggested that based on their relationship, it would not be surprising that they committed the crimes together. Defendant Bard has not shown that the remarks were plainly improper, particularly considering that the prosecutor later elicited from Hodges testimony concerning the gang affiliation between defendants Bard and Phlegm. Further, the trial court instructed the jury that the "lawyer's statements and arguments are not evidence" and jurors are generally presumed to follow their instructions. *Unger*, 278 Mich App at 235. In the absence of an objection, this instruction was sufficient to protect defendant Bard's substantial rights.

Defendant Bard next argues that the prosecutor engaged in misconduct during his redirect examination of Threlkeld's mother by asking her several questions about whether she had heard of people in Pontiac killing other people they knew. This is essentially an evidentiary issue framed as misconduct, which defendant Bard failed to preserve with an objection at trial. *Poindexter*, 138 Mich App at 332. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek*, 274 Mich App at 70. "The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that

attempt does not prejudice the defendant." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Here, it appears that the challenged questions were responsive to testimony elicited from Threlkeld's mother by the attorneys for defendants Phlegm and Smith with respect to her knowledge of Threlkeld's friendship with defendants Phlegm and Smith. Although the trial court sustained various objections to the prosecutor's questions, it is not apparent that the prosecutor acted in bad faith. "A prosecutor may fairly respond to an issue raised by the defendant." *Brown*, 279 Mich App at 135. Even if the prosecutor's questions were improper, defendant Bard has not shown that he was prejudiced. Whether Threlkeld's mother had heard of killings between other people who were not strangers was not outcome determinative of any issue in the case. *Unger*, 278 Mich App at 235. Contrary to defendant Bard's argument on appeal, the testimony did not paint the entire citizenry of Pontiac as murderous and fratricidal.

Third, defendant Bard argues that he was prejudiced by the prosecutor's response to his attorney's remarks concerning his intent to possibly recall a prosecution witness as a defense witness. In response, the prosecutor stated, "You don't need to make those proclamations. It's silly." Although a prosecutor may not personally attack defense counsel, *People v McLauglin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), this brief remark did not involve a personal attack. Rather, the prosecutor suggested that counsel's remarks were unnecessary and a waste of time. The trial court responded immediately by expressing its disagreement with the prosecutor's characterization of defense counsel's remarks. The prosecutor's brief remark, while better left unsaid, was not so egregious that it affected defendant Bard's substantial rights. *Unger*, 278 Mich App at 235; *McLauglin*, 258 Mich App at 648.

Affirmed and remanded for correction of defendant Phlegm's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto